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Edward Phillips
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T.R.A. DOCKET ROOM

NCWKFR0313
14111 Capital Blvd
Wake Forest, NC 27587-5900
Voice 919 554 7870
Fax 919 554 7913
edward.phillips@mail.sprint.com

November 19, 2004

Chairman Pat Miller
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: Post-Hearing Brief of United Telephone-Southeast, Inc.
Docket No. 03-00391

Dear Chairman Miller:

Please find enclosed for filing in the above-referenced proceeding the original and thirteen (13) copies of United Telephone-Southeast, Inc.'s Brief.

If I can be of assistance, please call me at your convenience.

Sincerely yours,

Edward Phillips

HEP:sm

Enclosures

cc: All Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Post-Hearing Brief of United Telephone-Southeast, Inc. upon all parties of record to this Docket by depositing a copy addressed to each in the United States Mail, first-class postage prepaid.

This 19th day of November, 2004.


Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Street, #1600
Nashville, TN 37219-8062

Guilford Thornton, Esquire
Stokes & Bartholomew
424 Church Street, #2800
Nashville, TN 37219

Joe Shirley
Office of the Attorney General
Consumer Advocate Division
425 Fifth Avenue
P. O. Box 20207
Nashville, TN 37202

Joelle Phillips
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-2200

Charles B. Welch, Esquire
Farris, Mathews, et al.
618 Church St., #300
Nashville, TN 37219



Edward Phillips
United Telephone-Southeast, Inc.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re:)	
)	
Petition of BellSouth Telecommunications, Inc.)	Docket No. 03-00391
for Exemption of Certain Services)	
)	

POST-HEARING BRIEF OF UNITED TELEPHONE-SOUTHEAST, INC.

On June 16, 2003, BellSouth Telecommunications, Inc. ("BellSouth") and Citizens Communications, Inc. ("Citizens") filed a *Petition for Exemption of Certain Services* with the Tennessee Regulatory Authority ("Authority") in this docket. BellSouth and Citizens jointly requested that both intraLATA toll and local ISDN-PRI services be exempted from regulation pursuant to Tenn. Code. Ann. §65-5-108(b).¹ At a Tennessee Regulatory Authority Conference held on September 13, 2004, the Authority exempted intraLATA toll services from regulation subject to four conditions mutually agreed upon by the parties.²

United Telephone-Southeast, Inc. ("Sprint") intervened in this docket on July 9, 2004 in order to participate in the second ISDN-PRI phase of this proceeding. Sprint's intervention petition was granted by the Pre-Hearing Officer on August 4, 2004.

In an effort to follow the same procedural path established for the first phase of this docket, the parties filed a joint motion on November 2, 2004 to enter the pre-filed

¹ Prior to a numbering change by the Tennessee General Assembly Tenn. Code Ann. § 65-5-108(b) has been referred to throughout this proceeding under its former numbering format as § 65-5-208(b)

² The four conditions are (1) prices will be filed in price lists (effective upon filing) but terms and conditions will continue to be tariffed, (2) existing customers will be given thirty (30) days notice of price increases, (3) prices will not be below cost, and (4) federal resale obligations remain unaffected.

testimony, discovery and various other documents into the evidentiary record; to file post-hearing briefs on November 22, 2004; and to conduct oral argument before the Authority in lieu of an evidentiary hearing. The joint motion of the parties was granted by the Pre-Hearing Officer on November 4, 2004.

Statutory Standard for Exemption. At the September 13, 2004 Authority Conference, Director Tate noted in her comments concerning intraLATA toll services that the Tennessee General Assembly had given the Authority the necessary tools to exempt from regulation those services for which existing and potential competition is an effective regulator of the price for such services. Specifically, Tenn. Code Ann. §65-5-108(b) provides:

The authority, after notice and opportunity for hearing, may find that the public interest and the policies set forth herein are served by exempting a service or group of services from all or a portion of the requirements of this part. Upon making such a finding, the authority may exempt telecommunications service providers from such requirements as appropriate. ***The authority shall in any event exempt a telecommunications service for which existing and potential competition is an effective regulator of price of those services.*** (Emphasis added).

Sprint's Evidence Supporting Exemption. Sprint has demonstrated that existing and potential competition acts as an effective regulator of the price of Sprint's local ISDN-PRI service throughout its Tennessee incumbent service territory. Sprint sponsored the Direct Testimony of David W. Marshall, Sprint's Business Solutions Sales Manager, who is located in Bristol, Tennessee. Mr. Marshall manages a group of eleven (11) sales people responsible for selling Sprint's local and long distance wireline and

wireless services throughout Northeast, Tennessee. Based upon his extensive sales experience plus competitor advertising attached to his direct testimony, Mr. Marshall summarized the status of local ISDN-PRI competition in Northeast Tennessee as follows:

United in Tennessee competes with facility based competitive local exchange carrier KMC for ISDN-PRI customers. In addition, XTN, MountaiNet, and CityNet compete with UTSE for ISDN-PRI customers. These CLECs own their own switching and transport facilities in United's territory and generally only require the use of UTSE's last-mile facilities to provision their ISDN-PRI services. These competitive local exchange carriers compete with UTSE not just on the basis of offering competitive prices but also by offering broader local calling areas than UTSE as well as fractional PRIs.³

Mr. Marshall's testimony went on to state that he sees KMC aggressively competing for ISDN-PRI customers in terms of pricing and marketing/sales efforts such that he estimates Sprint loses more than 50% of its head-to-head bids to KMC. Mr. Marshall also testified that this loss in head-to-head bids does not account for the business growth that KMC would enjoy with their existing base of customers or new customers KMC serves.

The direct and rebuttal testimony filed by other parties in this case fails to acknowledge the state of competition described by Mr. Marshall. The Direct Testimony of Terry Buckner of the Consumer Advocate and Protection Division ("CAPD") of the Tennessee Attorney General's Office simply asserts that Sprint's filing is a "me too" filing.⁴ But the comparison offered by Schedules 1, 2 & 3 of Mr. Buckner's Direct

³ Direct Testimony of David W. Marshall, pg. 2, lines 5-11 The model of CLECs owning their own switching facility and leasing incumbent LEC loops and/or transport is confirmed by the Direct Testimony of Mark E. Argenbright of AT&T at pages 3, 7-8

⁴ Buckner Direct at pages 7-8

Testimony⁵ do not contradict Mr. Marshall's testimony regarding the state of ISDN-PRI competition in Northeast Tennessee. The schedules instead confirm the existence of some of those competitors already identified by Sprint and the fact that these competitors have on file with the Authority tariffs for ISDN-PRI services.

The Rebuttal Testimony of Mr. Buckner and Dr. Steve Brown, both of the CAPD, also fail to counter Mr. Marshall's testimony. Mr. Buckner's description of Mr. Marshall's statement that Sprint loses more than 50% of head-to-head bids with KMC as "anecdotal"⁶ and Dr. Brown's claim that this testimony is "irrelevant information contributing nothing to the economic proof" and is "too subjective and too incomplete to be a measure or sign" of competition⁷ lack any factual and analytical basis.

The weight of the evidence demonstrates that Sprint faces serious existing and/or potential competition in its offering of ISDN-PRI service in Northeast Tennessee. As such, the Authority is required by statute to grant Sprint's exemption request for ISDN-PRI services. Despite this, the CAPD and AT&T attempted to raise several artificial barriers to discourage the Authority from granting an exemption for Sprint's ISDN-PRI services. Sprint next addresses these artificial barriers.

Artificial Barriers. The Direct and Rebuttal Testimony filed by the CAPD's Buckner and Brown and the Direct Testimony of AT&T's Argenbright contain arguments that would require the Authority to complete tests not required by Tenn. Code

⁵ The schedules reveal fifteen (15) competitors for BellSouth, three (3) for Sprint and two (2) for Citizens.

⁶ Buckner Rebuttal at page 4

⁷ Brown Rebuttal at page 15

Ann. § 65-5-108(b) prior to granting an exemption for ISDN-PRI service. The artificial barriers presented by CAPD and AT&T are as follows:

- The Petitioners have failed to perform a market share analysis.
- The Petitioners are dominant firms and a dominant firm analysis must be conducted.
- The competitors cited by the Petitioners are dependent upon the Petitioners facilities to provide their ISDN-PRI services.
- The Petitioners will be able to price squeeze competitors if the petition is granted.
- The competitors cited by the Petitioners are financially weak.

Sprint sponsored the Rebuttal Testimony of Dr. Brian K. Staihr to specifically address all these issues except the last. As far as the claim that competitors are financially weak, the CAPD has not performed a financial viability analysis of any competitors' businesses. Further, and most importantly this test is not a requirement under the law.

Market Share Study Regarding the necessity for a market share analysis, Dr. Staihr's testimony first noted that the standard set by Tenn. Code Ann. § 65-5-108(b) makes no mention of a market share analysis as a type of criterion or threshold to be examined before granting pricing flexibility. In fact, Dr. Staihr testified that the statute implicitly rejects the notion of a market share analysis because a market share analysis, by definition, suggests that it is the quantity of competition rather than the existence of competitive activity that is of importance, and the statute ignores the issue of quantity altogether.⁸

⁸ Staihr Rebuttal at pages 4-5.

Demonstrating this point, Dr. Staihr explained that often the potential for competition, rather than any specific quantity of competition, is sufficient to act as a controlling factor on prices. He noted that economists use the term “contestable market” to describe a market where an incumbent firm with 100% market share cannot act in an opportunistic manner regarding pricing or output because (in such a case) competitors can enter and win customers from the incumbent. In a contestable market the sum total of all competitors’ market share can be 0% but the potential for competition can still be an effective regulator of the incumbent firm’s prices. Tenn. Code Ann. § 65-5-108(b) specifically recognizes this possibility in providing that existing and potential competition be an effective regulator of price.⁹

The CAPD’s witnesses in this proceeding, while arguing that a market share study must be performed before any action can be taken by the Authority, have conspicuously failed to indicate what market share percentage they might consider to be indicative of a competitive market under the existing statutory standard. The CAPD’s conceivable answers range from competitors having a sum total 0% market share in the case of a contestable market to 100%. As a result, the CAPD has failed to articulate how a market share analysis is relevant.

Dominant Firm Analysis. As with a market share analysis, the Direct and Rebuttal Testimony of the CAPD’s Dr. Brown creates yet another artificial barrier to the Petitioners’ case that requires the completion of a dominant firm analysis. The CAPD takes the unsupportable position that since this analysis has not been performed, ISDN-PRI service cannot be exempted. Dr. Staihr’s testimony noted that the dominant firm

⁹ Staihr Rebuttal at pages 14-15.

model is an analytical framework well recognized in economics; however, he testified that there is no reason that the model must be used in this inquiry nor is there any reason to use the model in the way the CAPD has suggested. More importantly, a dominant firm analysis is not a test required by Tenn. Code Ann. § 65-5-108(b).

Petitioners as Wholesale Providers The CAPD and AT&T claim that granting exemption to ISDN-PRI will enable incumbents to set retail prices below cost and/or unfairly increase retail and wholesale ISDN-PRI service prices.

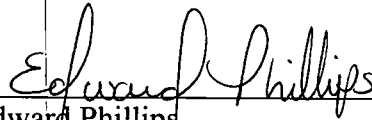
However, Dr. Staihr's Rebuttal Testimony provides the needed perspective on the so called dependency of competitors on incumbent LEC facilities and the ability of incumbents to arbitrarily increase its wholesale prices to competitors. As Dr. Staihr explains, although Sprint's competitors can and do deploy their own switches and transport and in some cases local loops to provide retail services, the incumbent LEC is still required by law to lease its facilities to such competitors at prices that reflects the incumbent's economy of scale. Where competitors provision their own facilities or purchase them from a third-party, it can be assumed that they do so because the wholesale prices are at least as favorable as those required to be offered by the incumbent LEC. This dynamic makes competitors much more than a mere reseller of the incumbent's services and allows for significant competition based upon price and other factors to occur.

Finally, contrary to assertions of Dr. Brown's Rebuttal Testimony (pages 16 - 23) that multiple resale rates could spring from a price list, the CAPD fails to understand that Sprint's retail price for ISDN-PRI service will be removed from the tariff and placed in a

price list filed with the Authority. As such, Sprint will comply with all legal requirements to price above cost and with the federal resale obligations by offering its price listed retail services to wholesale competitors at the price list amounts minus the Authority prescribed resale discount.

WHEREFORE, Sprint respectfully requests that the Authority grant the petition for exemption of Sprint's ISDN-PRI services pursuant to Tenn. Code Ann. § 65-5-108(b). While Sprint does not believe that the statute provides for any conditions to be placed on services once exempted, Sprint can agree to the conditions adopted by the Authority for intraLATA toll services.

Respectfully submitted this 19th day of November, 2004.



Edward Phillips

Attorney

United Telephone-Southeast, Inc.

Mailstop: NCWKFR0313

14111 Capital Boulevard

Wake Forest, North Carolina 27587-5900

Telephone: 919-554-7870

FAX: 919-554-7913

Email: edward.phillips@mail.sprint.com

Tennessee B.P.R. No. 016850